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Emily and Malcolm Fairbairn

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

EMILY FAIRBAIRN and MALCOLM
FAIRBAIRN,

Plaintiffs,

v.

FIDELITY INVESTMENTS
CHARITABLE GIFT FUND,

Defendant.

Case No. 3:18-cv-4881

COMPLAINT

JURY TRIAL DEMANDED

1 1. Private charitable giving is critically important to funding public and
2 social goods in the United States.¹ Over the last decade, a new vehicle for making these
3 charitable contributions has come to prominence: the commercial donor advised fund
4 or “DAF.”

5 2. Commercial DAFs are a special type of financial account that individual
6 donors open at a 501(c)(3) nonprofit organization that has been created by a for-profit
7 financial institution. When donors contribute assets to their DAF account, the nonprofit
8 organization takes legal title to the assets, but donors choose how funds are invested
9 and ultimately distributed to charitable organizations. The National Philanthropic Trust
10 describes DAFs as a kind of “charitable savings account.”

11 3. As of 2016, DAF accounts held more than \$85 billion in assets. The
12 nation’s largest sponsor, Defendant Fidelity Investments Charitable Gift Fund
13 (“Fidelity Charitable”), has more than \$16 billion under management. It receives more
14 donations than any charity—DAF or otherwise.

15 4. Although commercial DAFs may help advance important charitable
16 purposes, they also generate enormous profits for the financial institutions that are
17 affiliated with them. The nonprofit organizations that sponsor DAFs charge donors a
18 management fee for maintaining an account, and the sponsors in turn pay significant
19 fees to their affiliated financial institutions for a broad range of services. Moreover,
20 DAF assets are generally held in proprietary funds from which the financial institutions
21 generate additional profits.

22 5. To fuel their growth, commercial DAFs have increasingly targeted
23 wealthy donors with complex assets. This has led to intense competition among the
24 largest commercial DAFs. To succeed, DAF sponsors must convince individuals
25

26 ¹ As some leading commentators have explained: “In other countries, it is common
27 for universities, hospitals, art museums, symphonies, and social safety nets to be funded
28 by governments. In the US, charitable organizations, supported by tax-favored private
foundations, carry out many of the same social functions.” Lewis B. Cullman *et al.*, [The
Undermining of the American Charity](#), N.Y. Review of Books (July 14, 2016).

1 considering a donation of complex, non-cash assets that they have the sophistication
2 and personalized service to implement the donation in a manner and on terms that
3 advance the donor's objectives.

4 6. This case is about Fidelity Charitable making false promises to secure a
5 \$100 million donation from Plaintiffs Emily and Malcolm Fairbairn in late December
6 2017—and then outrageously mishandling the donation, costing the Fairbairns millions
7 of dollars and severely impairing their ability to support important charitable causes.

8 7. Like many wealthy donors, the Fairbairns made their donation using a
9 combination of cash and other assets—including 1.93 million shares in a publicly
10 traded company called Energous. The Fairbairns were angel investors in the company,
11 and they remain sizeable stakeholders today.

12 8. The Fairbairns could have made their donation to JP Morgan, with whom
13 they had long enjoyed a positive relationship and where they had already established a
14 \$20 million DAF. JP Morgan allows donors to “[a]dvise on the timing and rate at which
15 the donated securities are liquidated.” JP Morgan Charitable, [*Introducing the J.P.*](#)
16 [*Morgan Charitable Giving Fund*](#) at 2 (2017).

17 9. But Fidelity Charitable aggressively promoted itself as the best choice for
18 the Fairbairns' charitable giving in 2017. With respect to the Energous stock in
19 particular, Fidelity Charitable made a number of personalized promises: (1) it would
20 employ sophisticated, state-of-the-art methods for liquidating large blocks of stock,
21 (2) it would not trade more than 10% of the daily trading volume of Energous shares,
22 (3) it would allow the Fairbairns to advise on a price limit (i.e., a point below which it
23 would not sell without first consulting the Fairbairns), and (4) it would not liquidate
24 any shares until the beginning of 2018.

25 10. But after the Fairbairns donated the 1.93 million shares, Fidelity
26 Charitable promptly—and egregiously—broke each of its promises. It (1) liquidated
27 the entire block of shares in a three-hour window on December 29, (2) accounting for
28 16% of the day's exchange-traded volume and an incredible 35% of the volume over

1 the three-hour trading window, (3) using inappropriate methodologies that caused its
2 own trades to compete against each other and drive the share price down still further,
3 (4) without even telling the Fairbairns it was happening, let alone allowing them to
4 advise on a price limit.

5 11. The catastrophic result was a 30% run-down of the stock's value—leaving
6 the Fairbairns with tens of millions less to direct to charitable causes, and reducing the
7 size of their tax deduction by millions more.

8 12. To make matters worse, in stark contrast to its pre-donation
9 solicitousness, Fidelity Charitable has refused to provide the Fairbairns even a basic
10 explanation or documentation of what went wrong. The Fairbairns have sought
11 information about the liquidation, relevant internal policies, and the compensation that
12 Fidelity Charitable, its affiliated companies, and its employees received from this
13 transaction. But Fidelity Charitable has stonewalled them completely.

14 13. Perhaps that is because Fidelity Charitable believes it is too large and
15 powerful to be held to account. Alternatively, perhaps divulging this information would
16 reveal systemic undermining of donors' and charities' interests for the benefit of
17 Fidelity Charitable and its affiliated companies. Indeed, given the deep conflict of
18 interest and the immense incentives Fidelity Charitable faced to immediately liquidate
19 the Energous shares at whatever cost to the Fairbairns, the misconduct in this case
20 likely goes far beyond mere incompetence.

21 14. Whatever the explanation, the Fairbairns bring this lawsuit to uncover it,
22 and to obtain appropriate relief.

23 JURISDICTION AND VENUE

24 15. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332
25 because the amount in controversy exceeds \$75,000, exclusive of interest and costs,
26 and there is complete diversity of citizenship between the parties.

27 16. This Court has jurisdiction over Defendant Fidelity Charitable because it
28 conducts significant business operations in the State of California, and nearly all of the

actions giving rise to this case took place in the State of California. Fidelity Charitable accordingly has sufficient minimum contacts with this forum arising out of the actions that injured the Fairbairns to warrant this Court's exercise of jurisdiction.

17. Venue is proper in this district under 28 U.S.C. § 1391 because Fidelity Charitable resides there and a substantial part of the events and omissions giving rise to this action occurred in this district.

PARTIES

18. Plaintiffs Emily and Malcolm Fairbairn are residents of California. Through two of their entities, the Fairbairns were owners of the 1.93 million shares of Energous Corporation that are the subject of this lawsuit.

19. Defendant Fidelity Charitable is a Massachusetts 501(c)(3) non-profit corporation with its principal place of business in Massachusetts. Fidelity Charitable is the nation's largest DAF sponsor. Of the approximately \$85 billion in total assets held in DAF accounts, Fidelity Charitable holds \$16 billion (nearly 20%).

FACTUAL ALLEGATIONS

A. Commercial DAFs Like Fidelity Charitable Have Become A Major Vehicle For Private Charitable Giving.

20. In recent years, commercial DAFs have become an increasingly popular vehicle for charitable giving, largely because they fill a gap in the otherwise stark landscape of philanthropic vehicles. Outside of DAFs, donors have two basic, and very different, options to accomplish their philanthropic goals. They can either engage in private philanthropy, exemplified by the creation of a private foundation, or they can give directly to a public charity that is already in existence.

21. Private foundations give donors complete control over their charitable giving—donors can contribute assets at any time (and thus receive an immediate personal tax benefit), but then spread the distribution of those assets to charitable causes over a longer period.

1 22. But private foundations are expensive to set up and maintain. Moreover,
2 given the lack of oversight—and the resulting potential for abuse by individuals hoping
3 to avoid taxes—Congress has imposed limits on the tax benefits available for donations
4 to private foundations. For example, whereas a donor may deduct the full fair market
5 value of an appreciated stock when that stock is given directly to an existing public
6 charity, the donor may deduct only her cost basis in the stock (i.e., the amount she
7 originally paid) if she gives it to a private foundation.

8 23. Instead of setting up a private foundation, donors can give directly to
9 existing public charities. This has the obvious advantage of immediately benefiting
10 social goods that depend on philanthropy to function. Additionally, as noted, direct
11 donations receive favorable tax treatment compared to donations into private
12 foundations.

13 24. But giving directly to public charities eliminates the donor's ability to
14 control the timing of donations relative to the donor's broader financial and
15 philanthropic objectives. For example, some public charities are unable or unwilling to
16 accept a donation of appreciated stock or an even more complex asset. Or a donor may
17 wish to ensure that her large donation is used over time, but the charity may lack the
18 ability or willingness to accommodate that desire. At the simplest level, it may be tax-
19 efficient for a donor to make a large donation at one particular point in time, but the
20 donor may not yet know where that money will do the most good.

21 25. DAFs have come to prominence because they hit a sweet spot between
22 private giving via the paradigmatic vehicle of a private foundation and direct giving to
23 an already-existing public charity.

24 26. DAFs have existed in some form since the 1930s, but for decades were
25 little utilized. As recently as 1995, DAF accounts held only around \$2.4 billion in
26 assets, compared to \$85 billion in 2016. In recent years, however, for-profit financial
27 institutions like the ones affiliated with Fidelity Charitable have learned to leverage
28 DAFs' unique characteristics to bridge the gap between private foundations and direct

1 giving. And once these financial institutions recognized the opportunity this presented,
 2 “a number of [them] . . . formed charitable corporations for the principal purpose of
 3 offering donor advised funds, sometimes referred to as ‘commercial’ donor advised
 4 funds.” H.R. Rep. No. 109-455, at 180 (2006).

5 27. In a nutshell, commercial DAFs work as follows. Donors create an
 6 account with a sponsoring organization, here Fidelity Charitable, formed by a financial
 7 institution. When donors contribute assets to fund their DAF account, the sponsoring
 8 organization takes legal title to the assets, but it guarantees donors a right to choose
 9 how the DAF account’s funds are invested and a robust right to “advise” about how
 10 the funds will ultimately be distributed to existing public charities. Federal law requires
 11 DAFs to give donors “advisory privileges with respect to the distribution or investment
 12 of amounts” held in the account. 26 U.S.C. § 4966(d)(2).

13 28. The IRS Guidesheet on DAFs sets the baseline for donors’ advisory rights
 14 as “the right of a donor to provide noncompulsory recommendations, suggestions or
 15 consultative advice” about the disposition or investment of funds in the donor’s
 16 account. Internal Revenue Service, [*Donor-Advised Funds Guide Sheet Explanation*](#) at
 17 8 (July 31, 2008).

18 29. But a sponsoring organization has latitude to offer donors stronger
 19 advisory rights, short of allowing them to retain legal title to the funds. Fidelity
 20 Charitable gives account holders particularly robust advisory rights over the funds they
 21 contribute.

22 a. Fidelity Charitable holds funds in a dedicated account—and
 23 ultimately donates them to charitable organizations—in the donor’s name.

24 b. The donor has exclusive advisory rights over the funds—Fidelity
 25 Charitable cannot allow anyone else to dictate where they are donated.

26 c. Nor can Fidelity Charitable *itself* even make grants or otherwise
 27 take money out of an account without action from the donor.

28 d. Fidelity Charitable retains only a veto power over a donor’s

1 decisions, which it will exercise only when the donor attempts to use the money for an
2 improper or non-charitable purpose.

3 30. Thus, although Fidelity Charitable holds title to the money and serves as
4 a genuine check to make sure donors give to proper organizations, donors' rights are
5 strikingly broad.

6 31. But at the same time, because Fidelity Charitable and other DAF sponsors
7 are required to ensure that funds are ultimately distributed to legitimate charitable
8 organizations, donors who give to a DAF receive the same tax benefit they would for
9 giving directly to an existing public charity in the first instance.

10 **B. Fidelity Charitable Has Dominated The DAF Market—And Generated**
11 **Enormous Profits For Its Associated Financial Institution—By Convincing**
12 **Donors Like the Fairbairns To Donate Complex Assets.**

13 32. Commercial DAFs do more than help facilitate charitable giving by
14 donors, however. They also generate incredible profits for their associated financial
15 institutions. As one commentator has put it: “To be sure, *Fidelity's* interest in Fidelity
16 Charitable is not wholly charitable. While your funds sit in a DAF waiting to be
17 disbursed, they're invested in the market. And if they're in Fidelity's DAF, they'll be
18 invested in Fidelity's funds.” Felix Salmon, [*The Disrupter: How Fidelity and its donor-*](#)
19 [*advised fund are shaking up charitable giving for the better*](#), Slate (May 5, 2018).

20 33. No DAF sponsor has proved as lucrative to its associated financial
21 institution as Fidelity Charitable.

22 Fidelity Charitable, which was founded in 1991, had an absolutely
23 astonishing \$5.4 billion of revenue in 2015, the vast majority of which
24 came from its \$4.6 billion in fresh contributions. That is twice the size
25 of the Red Cross, and more than 14 times as much as the Museum of
26 Modern Art. More impressively, revenues rose 23 percent, or more than
27 \$1 billion, from the \$4.4 billion in 2014 revenues. Go back to 2011, and
28 the amount was just \$1.9 billion; in 2005, Fidelity Charitable's revenues

1 were below \$1 billion. In terms of sheer growth, no other institution
2 comes close.

3 *Id.*

4 34. Fidelity Charitable has generated its astonishing growth by focusing on
5 more than just cash donations. Fidelity Charitable, [Fidelity Charitable 2018 Giving](#)
6 [Report](#) at 2 (2018) (“Sixty one percent of 2017 contributions to Fidelity Charitable
7 were non-cash assets.”).

8 35. Like its major competitors, Fidelity Charitable broadly promotes its
9 ability to increase the tax efficiency of charitable giving by accepting and liquidating
10 complex assets. *See, e.g.,* Ana Swanson, [Wall Street is sitting on billions meant for](#)
11 [charities in “donor-advised funds,”](#) Chicago Tribune (June 22, 2016) (“Matt Nash, a
12 senior vice president of donor engagement at Fidelity Charitable, said that donor-
13 advised funds allow more money to go to charity, in part because they allow people to
14 donate complex assets, such as property, a share in a business or stock.”).

15 36. And it has marketed this ability with particular force in targeting ultra-
16 wealthy individuals with complex finances—for whom DAFs offer a unique
17 opportunity to (1) donate large amounts of complex, appreciated assets, (2) with the
18 full tax deduction of direct giving, while (3) also retaining ongoing control over their
19 donations. Abby Schultz, [Donor-Advised Funds Become Popular Philanthropic Tools,](#)
20 [Barrons](#) (Feb. 15, 2018) (“One reason donor-advised funds have exploded in popularity
21 for the philanthropically inclined is the ability of some major funds to take in complex
22 assets like restricted stock, real estate or even cryptocurrency.”).

23 37. The competition for these relatively few “big fish” is intense, with each
24 institution touting its own expertise as superior to the next. Indeed, this is the crux of
25 the competition: which organization can prove it offers the sophistication and
26 personalized service to handle a high-wealth individual’s complex financial picture and
27 carry out the individual’s charitable wishes accordingly.

28 38. In this regard, Fidelity Charitable has aggressively promoted the services

1 of its dedicated Complex Assets group, led by attorneys Ryan Boland and Karla Valas.
2 See Ryan Boland and Karla Valas, [*Charitable contributions: Looking beyond cash for*](#)
3 [*the right asset to give*](#), Fidelity Charitable (Jan. 2, 2018) (promoting the group's work,
4 including tax modeling, with private equity and other entrepreneurial donors and their
5 professional advisers to develop strategies that fit with the donor's objectives).

6 39. In 2017, Fidelity Charitable set its sights on Plaintiffs Emily and Malcolm
7 Fairbairn. It promised sophistication and white glove service in order to secure a \$100
8 million donation, and then flagrantly broke each of its promises, costing the Fairbairns
9 millions of dollars and severely impairing their ability to support important charitable
10 causes.

11 **C. In December 2017, The Fairbairns Decide To Donate \$100 Million To**
12 **Fight Lyme Disease.**

13 40. Emily and Malcolm Fairbairn run a San Francisco-based registered
14 investment advisor called Ascend Capital. Through Ascend, the Fairbairns manage
15 billions of dollars for a range of clients that include pension funds and university
16 endowments. They have successfully run Ascend for more than two decades.

17 41. Over the last decade, the Fairbairns have dedicated more than \$65 million
18 to charity: in 2010, they placed \$25 million in a charitable remainder trust; in 2013,
19 they placed \$20 million in a JP Morgan DAF account; and in 2014, they placed \$20
20 million in a Fidelity Charitable DAF account. They have also made numerous direct
21 donations to a wide range of organizations and causes. Most importantly, they have
22 been inspired by Warren Buffet to personally resolve that they will donate the majority
23 of their wealth during their lifetimes.

24 42. Like anyone who makes charitable donations, the Fairbairns have
25 received a personal financial benefit in return for their philanthropic efforts: a
26
27
28

1 deduction on their taxes.² In 2017, changes in the tax laws meant certain deferred
2 income could no longer be deferred. Given Ascend's success, the Fairbairns were
3 facing a substantial tax payment.

4 43. It was therefore the right time for the Fairbairns to take their philanthropy
5 to another level. They would donate \$100 million, much of which would be dedicated
6 to fighting Lyme disease—a disease that had recently stricken their entire family, and
7 which has become a silent, rapidly spreading, worldwide pandemic. *See, e.g.,* Donald
8 G. McNeil Jr., [*Tick and Mosquito Infections Spreading Rapidly, C.D.C. Finds*](#), N.Y.
9 Times (May 1, 2018).

10 44. Their donation would benefit a cause in desperate need of funding, about
11 which the Fairbairns care deeply. And doing so specifically in 2017 made personal
12 financial sense for the Fairbairns. Given these dual benefits, the only remaining
13 question was how best to accomplish the donation.

14 **D. In December 2017, Fidelity Charitable Convinces The Fairbairns To Make**
15 **The \$100 Million Donation Through Their Fidelity DAF.**

16 45. The Fairbairns were familiar with DAFs well before December 2017,
17 having established DAF accounts with both Fidelity Charitable and JP Morgan years
18 earlier. And both organizations knew the Fairbairns were precisely the sort of high-
19 wealth, complex-asset individuals critical to their business.

20 46. The Fairbairns' relationship with Fidelity stretches back to 1998. In 2014,
21 the Fairbairns placed \$20 million in a Fidelity Charitable DAF.

22 47. And in 2016—after extensive courting—Fidelity finally succeeded in
23 persuading the Fairbairns to become customers of their Fidelity Family Office
24 Services. The Family Office is a division of Fidelity that advertises “a dedicated and
25 exclusive focus on the ultra wealthy community and a deep understanding of their

26
27 ² This of course is the very incentive Congress implemented to induce charitable
28 giving. Lewis B. Cullman *et al.*, [*The Undermining of the American Charity*](#), N.Y.
Review of Books (July 14, 2016) (“In the US, charitable organizations, supported by
tax-favored private foundations, carry out many of the same social functions.”).

1 sophisticated needs.” Fidelity Investments, Family Office Services: Focused on the
2 ultra wealthy (2018). Joining the Family Office required the Fairbairns to move tens
3 of millions in additional investments to Fidelity. But doing so, as advertised by
4 Fidelity, gave them a “dedicated relationship team serv[ing] as [their] single point of
5 contact” for all interactions with any Fidelity entity going forward, along with “[a]ccess
6 to a dedicated Investment Analyst who can execute complex trading strategies by
7 leveraging Fidelity’s institutional capital markets capabilities.” *Id.*

8 48. The Fairbairns also had a longstanding relationship with JP Morgan, and
9 in particular with a wealth manager named Dennis Hearst. The Fairbairns had
10 interacted with and been impressed by Dennis for many years when he worked at
11 Goldman Sachs. In the course of these interactions, Dennis proved to be both reliable
12 and sophisticated. The Fairbairns were thus excited to work with him when he joined
13 JP Morgan’s private banking group. This relationship was indeed the catalyst for the
14 Fairbairns establishing a \$20 million DAF account with JP Morgan in 2013.

15 49. Before they even knew the Fairbairns were considering a \$100 million
16 donation in 2017, both institutions reached out to the Fairbairns about making
17 additional DAF contributions before year’s end.

18 a. Fidelity Charitable moved first. On December 12, 2017, Justin
19 Kunz—the Fairbairns’ dedicated point of contact within the Family Office—emailed
20 them to ask whether they had any bitcoin or “other securities” they would like to
21 contribute to their DAF in 2017.

22 b. Dennis from JP Morgan reached out the very next day. He sent the
23 Fairbairns a message similarly asking them about contributing “appreciated securities,”
24 “restricted stock,” or even “limited partnerships” to their JP Morgan DAF account.

25 50. In the following days, the Fairbairns had a series of conversations and
26 email exchanges with Justin, in which he aggressively pitched Fidelity Charitable as a
27 superior option to JP Morgan and Vanguard (which also sponsors a DAF).

1 51. On December 19, for example, Justin sent the Fairbairns an email saying
2 that

3 the Charitable team and I went up the ladder and got you the absolute
4 lowest rate available.

- 5 • Administrative fee would be **0.08%**... JPM is typically 0.20%
- 6 • Investment fees- index funds are lower than JP Morgan AND
- 7 Vanguard... for example Fidelity Total Markets is only
- 8 0.015%.
- 9 • Other investment options are available but our index funds
- 10 match or are lower than Vanguard's.

11 (ellipses in original).

12 52. Even more importantly, Justin's email continued to position Fidelity as
13 more sophisticated and more capable of meeting the Fairbairns' needs than its
14 competitors. Justin said, for example, that Fidelity Charitable would likely be able to
15 "hold Ascend HF," meaning the Fairbairns could potentially accomplish their donation
16 by donating shares in Ascend. Justin also boasted of "**the Intangibles**" that Fidelity
17 Charitable could provide in helping the Fairbairns achieve their philanthropic goals.

18 53. Several days later, Justin again touted Fidelity Charitable's superior
19 ability to handle complex assets. He asked the Fairbairns if they "would like to grant
20 [their] carried interest [i.e., the portion of Ascend's profits the Fairbairns received based
21 on the company's investment success, which had not yet been realized for tax purposes]
22 into the donor advised fund. Vanguard can't do this but we do it frequently ☺."

23 54. Justin even introduced the Fairbairns to the head of Fidelity Charitable's
24 Complex Assets Group, Ryan Boland, who gave the Fairbairns further information
25 about Fidelity Charitable's ability to accept donations of complex assets.

E. The Discussion Changes When One Of The Fairbairns' Major Stock Holdings Spikes In Value.

55. As the Fairbairns were considering how to most effectively structure their donation, they were presented with a unique opportunity.

56. On December 26, the Federal Communications Commission (FCC) approved the core technology behind a publicly-traded company called Energous, in which the Fairbairns were (and are) major stakeholders. Energous trades under the ticker symbol "WATT." This announcement caused Energous's stock price to skyrocket 39% over the course of December 27.

57. The Fairbairns' dedicated team at Fidelity had closely followed Energous since well before any discussions about the donation began. For example, as part of their ongoing discussions about the company, the Fairbairns sent Justin a slide deck about its core technology—and investment upside—in November 2016. In response, Justin mentioned having on multiple previous occasions "floated [the company] around the Family Office." And when the stock had a particularly good day in early 2017, a trader on their Fidelity team sent an unprompted email congratulating them on the "[n]ice move in WATT today!"

58. Accordingly, Energous's spike in value did not go unnoticed by Fidelity. And the Fairbairns immediately recognized the potential upside of donating the Energous holdings. Their average cost basis in the stock was substantially lower than its current, post-jump value. That meant they would face enormous capital gains tax if they eventually sold the shares for their own benefit. But if the Fairbairns instead donated the shares, their full liquidation value could go to charity tax free. Moreover, by donating the shares to a DAF, the Fairbairns could deduct the shares' full fair market value. That would mean both far more money to fight Lyme disease, *and* a smaller tax bill for the Fairbairns.

59. But the Fairbairns also had some concerns. They would be donating just under 10% of the company's outstanding stock, and they knew that Fidelity Charitable

1 would liquidate the stock after the donation.

2 60. This gave the Fairbairns pause. Liquidating a large block of stock can be
3 a delicate process; if not executed according to best practices, it can cause the stock's
4 value to crash. Among the most important considerations in a stock liquidation are the
5 timing and rate at which shares are sold off.

6 61. JP Morgan addresses these issues by simply giving donors control over
7 them. Donors can specify "the timing and rate at which the donated securities are
8 liquidated." JP Morgan Charitable, [*Introducing the J.P. Morgan Charitable Giving*](#)
9 [*Fund*](#) at 2 (2017). Indeed, the Fairbairns' experience with Dennis was that he would
10 work closely with them in managing all aspects of their DAF account and its associated
11 investments.

12 62. Fidelity Charitable has no such policy; its guidelines simply say it will
13 liquidate stock "at the earliest date possible." Fidelity Charitable, [*Fidelity Charitable*](#)
14 [*Policy Guidelines: Program Circular*](#) at 6 (2017).

15 63. Given the lack of built-in protections for circumstances requiring a
16 liquidation strategy more sophisticated than "the earliest date possible," the Fairbairns
17 had three principal concerns about Fidelity Charitable handling the WATT liquidation.

18 a. First, a botched liquidation would mean they had less money to
19 direct to the fight against Lyme disease;

20 b. Second, if the "earliest date possible" for liquidation was the same
21 day the stock was donated, it could significantly reduce the size of the Fairbairns' own
22 tax deduction. That is because the size of the deduction for donated stocks turns on the
23 stock's fair market value on the day the charitable organization receives it. And fair
24 market value is calculated by averaging the daily high and low prices for the stock.
25 Thus, a botched liquidation that happened on the same day as the donation could have
26 significant tax consequences; and

1 c. Third, as angel investors and continued stakeholders in Energous,
2 the Fairbairns were concerned that a botched liquidation would damage the company
3 going forward.

4 **F. Fidelity Charitable Makes Representations To Assuage The Fairbairns’**
5 **Concerns And Convince Them To Stick With Fidelity Charitable.**

6 64. These concerns caused the Fairbairns to reconsider making their donation
7 through Fidelity Charitable. They instead strongly considered using JP Morgan, where
8 they knew they could work with Dennis to execute a sophisticated, careful liquidation
9 strategy that would maximize the shares’ value. They told Justin this in a series of frank
10 conversations beginning on the afternoon of December 27.

11 65. Thus, to convince the Fairbairns to stick with Fidelity Charitable, Fidelity
12 Charitable made four critical representations about how it would handle the liquidation:
13 (1) it would employ sophisticated, state-of-the-art methods for liquidating large blocks
14 of stock, (2) it would not trade more than 10% of the daily trading volume of Energous
15 shares, (3) it would allow the Fairbairns to advise on a price limit (i.e., a point below
16 which Fidelity would not sell shares without first consulting the Fairbairns), and (4) it
17 would not liquidate *any* shares until the new year.

18 66. Justin made these representations on behalf of Fidelity Charitable, acting
19 as its agent. On information and belief, Justin was communicating with other agents of
20 Fidelity Charitable, and he reported the substance of those communications to the
21 Fairbairns.

22 67. In short, Fidelity Charitable promised the Fairbairns it had the
23 sophistication, would apply the necessary safeguards, and would give them the
24 necessary input, to make sure it treated the Energous stock “gently” (to use Fidelity
25 Charitable’s word).

26 68. Relying on these promises, the Fairbairns decided Fidelity Charitable was
27 indeed their best option. Malcolm Fairbairn informed Fidelity Charitable on December
28 27 that the Fairbairns would transfer 1.93 million shares of Energous stock to their

1 Fidelity Charitable DAF account.

2 69. Fidelity Charitable received 700,000 Energeous shares on December 28,
3 and the remaining 1.2 million on December 29.

4 **G. Fidelity Charitable Breaks Each Of Its Promises To The Fairbairns, To**
5 **Disastrous Effect.**

6 70. What the Fairbairns did not know was that—even as the final shares
7 landed in their DAF account—Fidelity Charitable immediately began liquidating the
8 entire 1.93 million-share block, and in the process egregiously breaking each of its
9 promises to the Fairbairns.

10 a. Rather than wait for the new year as it had promised to do, Fidelity
11 Charitable liquidated the entire 1.93 million shares in a matter of hours on the last
12 afternoon of the last business day of the year—perhaps the year’s single slowest trading
13 period.

14 b. Rather than trade only 10% of the daily volume as it had promised
15 to do, Fidelity Charitable traded approximately 16% of the daily volume and a
16 gobsmacking 35% of the volume over the three-hour trading window.

17 c. Rather than using sophisticated, state-of-the-art trading strategies,
18 Fidelity Charitable executed the liquidation using incompetent and inappropriate
19 methods.

20 d. And rather than allow the Fairbairns to advise on a price limit,
21 Fidelity Charitable did these things without even telling the Fairbairns they were
22 happening.

23 71. Put simply: Fidelity Charitable violated each of its representations to the
24 Fairbairns, and the predictable result was the very outcome the Fairbairns had feared—
25 the very reason they went with Fidelity Charitable only once it made those promises:

26 a. The Energeous shares were liquidated for tens of millions of dollars
27 less than they would have been had Fidelity Charitable honored its promises to the
28 Fairbairns.

b. And because Fidelity Charitable's actions drastically reduced the stock's fair market value on the same day the Fairbairns made their donation, the Fairbairns were able to deduct millions less from their taxes than they would have been able to had Fidelity Charitable not broken its promises.

H. Fidelity Charitable Entirely Botched The WATT Liquidation.

72. At least two of the promises Fidelity Charitable broke—the 10% limit on daily volume and the Fairbairns' ability to advise on a price limit—were designed to ensure that Fidelity Charitable's liquidation of the stock did not cause the stock's value to plummet. But as noted, Fidelity Charitable's liquidation violated both of those promises. And in so doing, Fidelity Charitable botched the trade entirely.

73. The easiest way to understand why is to look at the outcome of the liquidation. A large trade executed responsibly would affect the stock price to a limited extent. But here, Fidelity Charitable's trading crashed the stock, driving the share price down *more than 30%*.

74. The process by which Fidelity Charitable liquidated the shares was also indefensible. For example:

a. To liquidate a large block of stock without driving down the price, traders must appropriately spread out the sale so that the market may absorb it. Fidelity Charitable, however, liquidated the *entire position* over the course of three hours on the last afternoon of the last business day of the year—likely the single worst time period in the entire year to do so.

b. It did so, moreover, without even *attempting* to find ways to mitigate its outsized trading volume over this period—for example by seeking to sell shares in large blocks (rather than individually) or by looking for additional liquidity in readily available off-exchange trading pools.

c. Additionally, trading algorithms are generally a central feature of large stock liquidations. Fidelity Charitable flagrantly misused them here. It deployed multiple algorithms simultaneously, in a way that caused the algorithms to compete

1 against each other in the market and further drive down the share price.

2 d. Finally, even when traders otherwise follow stock liquidation best
3 practices, it is critically important that they impose safeguards that permit reassessment
4 in the event the trader's strategies begin moving the market more than expected. In
5 fact, virtually all automated trading machines have such safeguards built into the
6 platform, and Fidelity has established generally applicable internal safeguards that
7 should have triggered a reassessment here. But Fidelity Charitable either disregarded,
8 disabled, or failed altogether to impose any safeguards here.

9 75. Put simply, Fidelity Charitable acted, at best, with egregious
10 incompetence in liquidating the WATT shares. At worst, its outrageous conduct was
11 motivated by improper self-interest—the desire to get as much money as possible
12 under management by year's end, no matter the cost to the Fairbairns. *See infra* ¶ 83.
13 Either way, the result was the shares yielding tens of millions of dollars less than they
14 should have.

15 **I. The Fairbairns Confront Fidelity About The Botched Liquidation But Are**
16 **Stonewalled.**

17 76. In light of Fidelity Charitable's promise that it would not liquidate the
18 WATT shares until the new year, two weeks passed before the Fairbairns realized the
19 wild trading in WATT on December 29 had in fact been the complete liquidation of
20 their donated shares.

21 77. On January 15, Malcolm Fairbairn emailed Justin from the Family Office:
22 Hi Justin.

23 Could you provide a recap of the transactions involving our donated shares
24 for all securities. To me it seems aggressive to liquidate 9.9 percent of a
25 company's shares in a half day of trading. Please include number of shares
26 and orders given and at what times.

27 I was told that the selling would begin after the first of the year, you guys
28 would be gentle with the stock (less than 10% of trading volume) and we

could advise on a price limit if necessary. So I was surprised to hear that it was liquidated on the last day of December.

Best Regards

Malcolm

78. Justin did not dispute that Fidelity Charitable had made any of the promises set out in Malcolm's email. He simply responded (incorrectly) that "[t]he trading desk within our Charitable Group stuck to under the 10% of the volume," and that he could set up a phone call to discuss.

79. After a week of back and forth, Justin finally shared a chart showing only basic information about the trade executions.³ At no point did he ever dispute that Fidelity Charitable had made the promises about how and when it would liquidate the shares. In fact, on a subsequent phone call with the Fairbairns and other Fidelity employees, Justin himself reiterated that Fidelity Charitable had made those promises.

80. After Justin shared the original chart, the Fairbairns sought additional, specific information about the trades, Fidelity Charitable's trading policies, the commissions or other compensation that Fidelity Charitable and its employees received, and other basic details about their DAF account and Fidelity Charitable's

³ Here is the chart Justin provided:

Tranche	Time Order Began	Price at time tranche began	Strategy	Price at time tranche completed	Our Average Price	Participation Rate
700,000	1:17	\$ 28.00	TWAP until 3:45	\$ 20.52	\$ 24.5302	6.90%
575,000	1:31	\$ 27.30	TWAP until 3:45	\$ 20.52	\$ 23.7837	5.93%
313,862	3:30	\$ 22.15	VWAP until 4:00	\$ 19.45	\$ 20.4140	7.72%
343,123	3:45	\$ 20.61	VWAP until 4:00	\$ 19.45	\$ 19.9268	15.73%

1 actions. The Fairbairns also repeatedly asked for any kind of explanation for Fidelity
2 Charitable's astonishing and inexplicable conduct.

3 81. In stark contrast to its pre-donation solicitousness, however, Fidelity
4 Charitable completely stonewalled the Fairbairns, refusing even to tell them how much
5 money it (or its affiliated financial institution) charged them to make the trades, and
6 eventually simply saying it was "comfortable" with the level of information it had
7 provided and would provide no more.

8 82. The basis for this refusal is unclear. Perhaps Fidelity Charitable believes
9 it is simply too large and powerful to be held accountable for its actions. Alternatively,
10 perhaps it has refused to provide the information because doing so would reveal
11 systemic undermining of donors' and charities' interests in favor of Fidelity's own
12 bottom line.

13 83. And indeed, incompetence alone cannot explain Fidelity Charitable's
14 outrageous actions in this case. Given the significant incentives it faced to liquidate the
15 Energous shares immediately, at whatever cost to the Fairbairns, it is beyond likely that
16 Fidelity Charitable acted based on improper, self-interested motivations.

17 a. As an initial matter, Fidelity Charitable generates massive profits
18 for its parent and sister companies by placing virtually all DAF contributions in Fidelity
19 investment products. Thus, the sooner it liquidated the Energous shares, the sooner that
20 money could start generating profits.

21 b. What's more, Plaintiffs have reason to believe that the success of
22 Fidelity Charitable and its employees—and the resulting compensation those
23 employees earn—is tied to the amount of assets under management (i.e., held in
24 Fidelity investment products) *as of year's end*. Thus, the agents of Fidelity Charitable
25 responsible for the liquidation had every incentive to liquidate the shares immediately.
26 And given the possibility that the Fairbairns would make donations out of their DAF
27 account over the coming year, there was no guarantee those assets would remain under
28 Fidelity's management at the end of 2018. Fidelity Charitable and its agents

1 accordingly stood to benefit from immediate liquidation *even if it meant a significant*
 2 *reduction in the shares' liquidation value.*

3 **J. To Mitigate The Harm Of Its Botched Liquidation, Fidelity Charitable**
 4 **Offers To Help The Fairbairns Cheat On Their Taxes.**

5 84. In addition to its prevarications and stonewalling with regard to the trades,
 6 Fidelity Charitable attempted to mitigate the harm of its botched liquidation by
 7 suggesting that the Fairbairns claim December 28, rather than December 29, as the date
 8 for the entire Energeous donation.

9 85. Measuring the stock's fair market value as of December 28 would result
 10 in a far larger deduction for the Fairbairns.

11 86. But there was only one problem: Fidelity Charitable received only part of
 12 the donation on December 28. The rest of the shares were received on December 29. It
 13 would thus be tax fraud to claim December 29 as the date for the entire donation.

14 87. This did not deter Fidelity Charitable. It told the Fairbairns it would send
 15 a letter saying the stock was donated in "December 2017," and "you and your CPA can
 16 decide how to interpret which day it came in." The Fairbairns understood Fidelity
 17 Charitable to be suggesting that it would help them skirt the law.

18 88. Over Emily Fairbairn's protest that she was unwilling to break the law,
 19 Fidelity Charitable sent the letter. (The Fairbairns have not claimed December 29 as
 20 the date for the entire donation.)

21 **COUNT ONE**

22 *Misrepresentation*

23 89. Plaintiffs re-allege each preceding paragraph as if fully set forth herein.

24 90. The Fairbairns would not have donated the WATT stock to Fidelity
 25 Charitable but for its promises about how it would handle their donation. They would
 26 either not have donated the stock at all, or would have done so through JP Morgan.

27 91. Fidelity Charitable promised that (1) it would employ sophisticated,
 28 state-of-the-art methods for liquidating large blocks of stock, (2) it would not trade

1 more than 10% of the daily trading volume of Energous shares, (3) it would allow the
2 Fairbairns to advise on a price limit (i.e., a point below which it would not sell without
3 first consulting the Fairbairns), and (4) it would not liquidate any shares until the
4 beginning of 2018.

5 92. Fidelity Charitable made each of these promises for the purpose of
6 inducing the Fairbairns to donate the WATT shares. It did so not just to assuage the
7 Fairbairns' concerns about the price it would achieve in liquidating the stock, but also
8 specifically to address the Fairbairns' concerns about how the liquidation might affect
9 their tax deduction.

10 93. The Fairbairns had no reason not to take Fidelity at its word.

11 94. Fidelity Charitable, however, flagrantly violated each of these promises.
12 It (1) liquidated the entire block of shares on December 29, (2) accounting for around
13 16% of the day's trading volume (and 35% of volume over the three-hour trading
14 window), (3) using inappropriate trading methodologies, in a way that caused
15 Fidelity's own trades to compete against each other, (4) without even telling the
16 Fairbairns it was happening, let alone allowing them to advise on a price limit.

17 95. Fidelity Charitable knew when it made these promises that it had no
18 intention of keeping them. In the alternative, the Fidelity Charitable made the promises
19 intending to honor them but then negligently and recklessly failed to do so.

20 96. As a result, the WATT shares were liquidated for far less than they would
21 have been, and the Fairbairns' tax deduction was smaller than it would have been, had
22 Fidelity Charitable honored its promises.

23 97. This Court should therefore order Fidelity Charitable to make the
24 Fairbairns whole with respect to their tax deduction—i.e., pay the Fairbairns the
25 difference between their actual deduction and the deduction they would have received
26 had Fidelity Charitable honored its promises.

27 98. This Court should also order Fidelity Charitable to make the Fairbairns
28 whole with respect to their donation—i.e., restore to the Fairbairns' DAF account the

1 amount of money that a reasonably competent liquidation (adhering to the promises
2 made) would have yielded.

3 99. In the alternative, this Court should order rescission of the donation.

4 **COUNT TWO**

5 *Breach of Contract*

6 100. Plaintiffs re-allege each preceding paragraph as if fully set forth herein.

7 101. Fidelity Charitable's conduct also breached an enforceable agreement
8 between the parties about how Fidelity Charitable would treat the Fairbairns' donation.

9 102. In consideration for the Fairbairns donating the 1.93 million WATT
10 shares, Fidelity Charitable agreed (1) it would employ sophisticated methods in
11 liquidating those shares, (2) it would not trade more than 10% of the daily trading
12 volume, (3) it would allow the Fairbairns to advise on a price limit, and (4) it would
13 not liquidate *any* shares until 2018.

14 103. The Fairbairns performed their obligation under the agreement by
15 donating the 1.93 million shares.

16 104. Fidelity Charitable, however, breached by (1) liquidating the entire block
17 of shares on December 29, (2) accounting for around 16% of the day's trading volume
18 (and 35% of volume over the three-hour trading window), (3) using inappropriate
19 trading methodologies, in a way that caused Fidelity's own trades to compete against
20 each other, (4) without allowing the Fairbairns to advise on a price limit.

21 105. As a result, the Fairbairns' tax deduction was smaller than it would have
22 been in the absence of Fidelity Charitable's breach, and the Fairbairns were left with
23 far less money to direct to charitable causes through their DAF account than they would
24 have been absent Fidelity Charitable's breach.

25 106. At a minimum, Fidelity Charitable's conduct violated the implied
26 covenant of good faith and fair dealing present in every contract.

27 107. This Court should therefore order Fidelity Charitable to make the
28 Fairbairns whole with respect to their tax deduction. This Court should also order

1 Fidelity Charitable to make the Fairbairns whole with respect to their donation.

2 108. In the alternative, this Court should order rescission of the donation.

3 **COUNT THREE**

4 *Estoppel*

5 109. Plaintiffs re-allege each preceding paragraph as if fully set forth herein.

6 110. The doctrine of estoppel holds a party to what it promised when those
7 promises reasonably induced another party to act.

8 111. Fidelity Charitable's promises about how it would handle the Fairbairns'
9 donation induced the Fairbairns to donate the Energeous shares.

10 112. Fidelity Charitable should reasonably have expected its promises to
11 induce the Fairbairns' donation—indeed, that was the very reason it made the promises.

12 113. This Court should therefore hold Fidelity Charitable to its word and order
13 Fidelity Charitable to place the Fairbairns where they would be had it not broken its
14 promises.

15 114. Accordingly, the Court should order Fidelity Charitable to restore to the
16 Fairbairns' DAF account all losses attributable to Fidelity Charitable's wrongdoing,
17 and also to repay the Fairbairns for the tax loss attributable to this wrongdoing.

18 115. In the alternative, this Court should order rescission of the donation.

19 **COUNT FOUR**

20 *Negligence*

21 116. Plaintiffs re-allege each preceding paragraph as if fully set forth herein.

22 117. Fidelity Charitable's liquidation of the WATT shares utterly failed to meet
23 even baseline standards of competence or reasonableness. Its actions are little different
24 than if the Fairbairns had sent it a briefcase full of stock certificates, and it thought
25 "liquidating" them meant throwing them in the ocean.

26 118. In so doing, Fidelity Charitable deprived the Fairbairns of the ability to
27 direct money to fight Lyme disease, and also significantly reduced the size of the tax
28

1 deduction the Fairbairns were able to take.

2 119. The Fairbairns retain robust, exclusive advisory rights over the disposition
3 of funds held in their DAF account. Fidelity Charitable is obligated to abide by the
4 Fairbairns' directions as long as the Fairbairns direct the money to proper charitable
5 purposes. Thus, by negligently reducing the amount of money over which the
6 Fairbairns have advisory power, Fidelity Charitable has directly and materially
7 impaired the Fairbairns' rights.

8 120. Additionally, after specifically promising to handle the WATT liquidation
9 in a way that would maximize the Fairbairns' tax deduction, and thereby incurring a
10 duty to act reasonably with respect to the Fairbairns' deduction, Fidelity Charitable's
11 negligence in fact significantly decreased the size of the tax deduction the Fairbairns
12 were able to take.

13 121. This Court should therefore order Fidelity Charitable to restore to the
14 Fairbairns' DAF account the amount of money that a reasonably competent liquidation
15 of the Energos shares would have yielded, and to make the Fairbairns whole with
16 respect to their tax deduction.

17 **COUNT FIVE**

18 *California Unfair Competition Law (UCL)*

19 122. Plaintiffs re-allege each preceding paragraph as if fully set forth herein.

20 123. California law prohibits "any unlawful, unfair or fraudulent business act
21 or practice." Cal. Bus. & Prof. Code § 17200.

22 124. Here, Fidelity Charitable violated the UCL by making false promises that
23 wrongfully induced the Fairbairns to donate the WATT shares.

24 125. This Court should accordingly order Fidelity Charitable to return to the
25 Fairbairns the value of those shares as of the time of the donation.

26 **PRAYER FOR RELIEF**

27 WHEREFORE, Plaintiffs pray for judgment against Fidelity Charitable as
28 follows:

- 1 1. For equitable relief and monetary relief, in an amount to be proven at trial,
- 2 plus all applicable interest and costs;
- 3 2. For all attorneys' fees and costs incurred in bringing this action, to the
- 4 extent recoverable by law; and
- 5 3. For all other relief the Court deems appropriate, proper, and just.

6 **DEMAND FOR JURY TRIAL**

7 Plaintiffs demand a jury trial for all claims so triable.

8 Respectfully submitted,

9 Dated: August 10, 2018

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